No. 91-2019

In the
Supreme Court of the United States
October Term, 1992

STATE OF MINNESOTA,

Petitioner,

vs.

TIMOTHY DICKERSON,

Respondent.

ON WRIT OF CERTIORARI TO THE
MINNESOTA SUPREME COURT

PETITIONER'S REPLY BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

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ARGUMENT

I.

OFFICER ROSE'S REASONABLE AND CAREFUL PAT SEARCH OF THE OUTER SURFACES OF RESPONDENT'S POCKET WAS PERMISSIBLE UNDER *TERRY*.

A. The Trial Court Record Shows that the Pat Search of Respondent's Pockets did not Exceed the Scope of a Valid *Terry* Pat Search.[1]

The following testimony by Officer Rose, which constitutes the only evidence in the record concerning the scope of the pat search, demonstrates that he conducted a limited and reasonable weapons pat search of Respondent:

> I started down from the shoulders to the underarms. I then went across the waistband and I came back up to the chest and I hit a nylon jacket that had a pocket and the nylon jacket was very fine nylon and as I pat-searched the front of his body I felt a lump, a small lump, in the front pocket. I examined it with my fingers and it slid and it felt to be a lump of crack cocaine in cellophane.

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1. Respondent's Brief on the Merits does not contest the findings by the three state courts below that Officer Rose had sufficient grounds to stop Respondent and conduct a weapons pat search of Respondent's person. *See Terry v. Ohio*, 392 U.S. 1, 29-30 (1968).

(T. 9).[2] Officer Rose further testified he did not reach inside Respondent's pocket during this pat search until *after* he identified the lump as crack cocaine (T. 9-10).

Nothing in the record indicates that Officer Rose continued examining the object beyond the point he determined it was not a weapon. Officer Rose was never cross-examined about the scope of the touching nor did Respondent present any evidence to rebut Officer Rose's testimony on this issue.[3] Indeed, Respondent's counsel admitted that "[i]n the officer's testimony *he said right away he knew what he felt was crack*, he never suspected that it was a weapon" (T. 45) (emphasis added).[4]

Like Officer McFadden in *Terry v. Ohio*, 392 U.S. 1 (1968), Officer Rose's pat search simply involved the pat down of "the outer clothing" and was confined "strictly to what was minimally necessary to learn" whether

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2. This testimony is in sharp contrast to the Minnesota Supreme Court's characterization of the pat search as one involving "squeezing, sliding and otherwise manipulating the contents of [Respondent's] pocket." *State v. Dickerson*, 481 N.W.2d 840, 844 (1992) (Pet. App. A-7).

3. Respondent never claimed during either the trial court or state appellate court proceedings that the "feel" of the pocket exceeded the scope of a *Terry* pat search. Instead, Respondent claimed only that if a pat search was authorized, Officer Rose exceeded the scope of the pat search when he placed his hand into Respondent's pocket. *See* Supplemental Memorandum (J.A. 31); Brief for Appellant at 27 and 34, *State v. Dickerson*, 469 N.W.2d 462 (Minn. Ct. App. 1991), *aff'd*, 481 N.W.2d 840 (Minn. 1992).

4. This same concession was made at page 24 of Respondent's Brief in Opposition to Petition for a Writ of Certiorari.

Respondent's pocket contained a weapon. *Id.* at 30.[5] "He did not conduct a general exploratory search for whatever evidence of criminal activity he might find." *Id.* Only after he developed probable cause that Respondent possessed crack cocaine, did Officer Rose invade Respondent's "person beyond the outer surfaces of his clothes." *Id.*[6] His initial touching and reflex examination of the pocket was consistent with the "careful exploration of the outer surfaces of a person's clothing all over his or her body in an attempt to find weapons" authorized by *Terry*. *Id.* at 16.[7] Officer Rose's "simple act of feeling the outline and shape of the lump was permissible under *Terry*." *State v. Dickerson*, 481 N.W.2d 840, 849 (Minn. 1992) (Coyne, J., dissenting) (Pet. App. A-18).

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5. This Court indicated in *Terry* that a weapons pat search did not constitute just a polite patting of the outside clothes, but may well require a significant probing of the detainee's outer clothing. *See Terry v. Ohio*, 392 U.S. 1, 16 n.13 (1968).

6. These facts easily distinguish this seizure from the impermissible seizure found in *Sibron v. New York*, 392 U.S. 40 (1968). The police officer in *Sibron* reached into the suspect's pocket and seized envelopes of heroin despite the absence of both reasonable grounds to believe the suspect was armed and probable cause to believe the suspect possessed contraband. *See id.* at 62-64. In contrast, Officer Rose possessed reasonable suspicion that Respondent was armed, limited the scope of his search to weapons and did not reach into Respondent's pocket until *after* he developed probable cause to believe Respondent possessed crack cocaine.

7. Unless a continued search is justified on other grounds, an officer must cease his examination of an object once he determines it is not a weapon. See Wayne LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 9.4(c) at 524 (2d ed. 1987); *see generally Terry v. Ohio*, 392 U.S. 1, 29 (1968).

Officer Rose's uncontested testimony demonstrates that his examination of the object was *contemporaneous with and part of a valid pat search*. This coincidental identification of the crack cocaine was not the product of a protracted examination of the pocket. Instead, this identification was the result of Officer Rose's initial touching of the pocket, his extensive experience in feeling crack cocaine through clothing on approximately 75 prior occasions and the totality of the circumstances surrounding the stop (T. 5).

This case does not present the second search problem found in *Arizona v. Hicks*, 480 U.S. 321 (1987). In *Hicks*, it was clear that the officer, in moving the stereo equipment, was conducting a search unrelated to his lawful objective of searching for evidence pertaining to a shooting. *Id.* at 325. In contrast, Officer Rose was clearly acting within his lawful search for weapons when he discovered the contraband. He did not launch a separate search for contraband during his touching of the pocket.

Terry established a "bright line" rule which allows police to conduct a careful examination of a suspect's outer clothing for weapons. Police are required to cease this examination only when they determine that the suspect is unarmed. Officer Rose's pat search of Respondent's pocket was within this "bright line" rule. It is reasonable for officers to conduct an instantaneous and reflex tactile examination of objects encountered during a pat search. Only after Officer Rose obtained probable cause to believe that the object was crack cocaine did a second intrusion occur -- the seizure of the crack cocaine from the pocket.

Because there was probable cause for this seizure, this second intrusion was justified.[8]

B. The Legal Conclusion of the Minnesota Supreme Court Concerning the Scope of the Search Should Be Rejected Because it is Predicated upon the Erroneous Application of the Subjective, rather than the Objective, Standard.

The supreme court's legal conclusion concerning the scope of the search was premised upon the incorrect application of the subjective standard to the search, rather than upon factual findings independent from those made by the trial court.[9] The supreme court explicitly relied upon

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8. The "bright line" rule established in *Michigan v. Long*, 463 U.S. 1032, 1050 (1983), held that police are not required to ignore contraband discovered during a legitimate *Terry* search. Moreover, in *Arizona v. Hicks*, 480 U.S. 321, 326 (1987), this Court stated "'[i]t is well established that under certain circumstances the police may *seize* evidence without a warrant'" if "the initial intrusion" bringing the police within plain view is "one of the recognized exceptions to the warrant requirement." *Id.* (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 465 (1971) (emphasis in original)). Since the initial intrusion in this case was permissible as part of a legitimate *Terry* search, seizure of the discovered contraband was permissible. *See* Petitioner's Brief on the Merits, pp. 21-27.

9. The facts concerning the scope of the pat search were *undisputed* at trial and the Minnesota Supreme Court relied upon the same factual record that was before the trial court. *See State v. Dickerson*, 481 N.W.2d 840, 842-43 (Minn. 1992) (Pet. App. A-3-4). The Minnesota Supreme Court did, however, misquote Officer Rose's testimony. Specifically, the supreme court quoted the officer as saying, "I examined it with my fingers and slid it and felt it to be a lump of crack cocaine in cellophane." *Id.* at 843 (Pet. App. A-4) (emphasis added). Officer Rose testified that when he examined the

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Officer Rose's statement that he pat searched Respondent for weapons and "drugs" to justify its conclusion that the weapons pat search exceeded the scope of *Terry*. *Dickerson*, 481 N.W.2d at 844 (Pet. App. A-7). Its consideration of the officer's subjective state of mind, rather than the objective circumstances of the search, is contrary to the constitutional criteria set forth by this Court[10] in *Horton v. California*, 496 U.S. 128 (1990).

Under *Horton*, constitutional review of searches requires the "application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer." *Id.* at 138. Therefore, under this objective standard, Officer Rose is permitted to conduct a careful pat search for weapons consistent with the dictates of *Terry* even if he fully expected to find contraband during the weapons search.[11] *See id.*

More importantly, an objective evaluation of an officer's conduct is necessary to maintain the "bright line" rule for protective pat searches. "A single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on . . . the specific

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Footnote 9 cont from previous page

crack cocaine "it slid" (T. 9). He never stated he "slid" the crack cocaine.

10. In *Ker v. California*, 374 U.S. 23, 34 (1963), this court noted it will review a state court's conclusions to determine whether the constitutional "criteria established by this Court have been respected."

11. It was entirely reasonable for Officer Rose to suspect that Respondent could be carrying both weapons and drugs. Officer Rose had extensive experience in finding both drugs and weapons at the crack house from which he saw Respondent exit (T. 6-7, 14, 16, 21).

circumstances they confront." *Dunaway v. New York*, 442 U.S. 200, 213-14 (1979). To hold that a reasonable pat search of a suspect's pocket is permissible only when an officer has no expectation of discovering contraband is, at best, needlessly confusing and unworkable. At worst, it imperils an officer's safety. *See generally Illinois v. Andreas*, 463 U.S. 765, 773 (1983) (to be workable, fourth amendment standards "should be objective, not dependent on the belief of individual police officers").

Application of the objective standard shows that Officer Rose developed probable cause to believe Respondent possessed crack cocaine during a valid *Terry* weapons search.[12] The Minnesota Supreme Court's contrary conclusion was predicated upon the erroneous application of the subjective standard and this conclusion should be rejected. *See United States v. Singer Mfg. Co.*, 374 U.S. 174, 192-93 (1963) (rejected lower court conclusions based upon the application of erroneous standard to facts which were essentially undisputed). Consequently, the "plain feel" issue upon which this court granted certiorari is presented by the facts of this case.[13]

12. *See* Argument I.A. of this Brief.

13. The decision by the Minnesota Supreme Court clearly shows both that the supreme court ruled on the propriety of a "plain view" exception to the warrant requirement and that this ruling constituted a holding in the decision. *See State v. Dickerson*, 481 N.W.2d 840, 844-45 (Minn. 1992) (Pet. App. A-8).

II.

THE QUESTION PRESENTED AND ALL SUBSIDIARY QUESTIONS SHOULD BE CONSIDERED ON THE MERITS.

A. All Issues Presented in Petitioner's Brief on the Merits were Presented in the Petition for a Writ of Certiorari.

The Petition for a Writ of Certiorari (hereinafter Petition) raised all of the issues subsequently discussed in Petitioner's Brief on the Merits and the Brief for the United States as Amicus Curiae Supporting Petitioner. In addition to the question presented, the Petition also made references to the subsidiary issues of seizure incident to a probable cause arrest and exigent circumstances.

The Petition stated that warrantless seizures of contraband, under circumstances similar to those found in this case, have been affirmed under the alternate rationale of "search incident to arrest" (Pet. at 19).[14] The exigent circumstances rationale for the warrantless seizure was inherent in the Petition's reference to *Texas v. Brown*, 460 U.S. 730 (1983). The Petition quoted language from *Brown* which stated that requiring a warrant for the probable cause seizure in that case constituted a "'needless inconvenience' . . . that might involve danger to the police

14. Respondent's claim that the Petition did not raise the search incident to arrest issue is contradicted by Respondent's Brief in Opposition to Petition for a Writ of Certiorari where, at pages 38-39 and 44, Respondent acknowledged that Petitioner raised this issue.

and public" (Pet. at 11) (quoting *Brown*, 460 U.S. at 739).[15]

Moreover, the issues of search incident to arrest and exigent circumstances are properly before this Court since they are "subsidiary" issues which are "fairly included" in the question presented. *See* Sup. Ct. R. 14.1. These issues do not require additional factual findings and, if the question presented is answered in the affirmative, simply provide alternate reasons as to why a warrant was not necessary for the seizure of the crack cocaine.

B. All Issues Raised in Petitioner's Brief were Considered by the Minnesota Supreme Court and were Properly Preserved for Consideration by this Court.

(1) Respondent waived consideration of the alleged preservation defects when he failed to raise these defects before certiorari was granted.

Respondent's preservation claims were not raised in his Brief in Opposition to the Petition for a Writ of Certiorari. Consequently, because these claims do not go to jurisdiction, Respondent should be deemed to have waived these alleged preservation defects. *See Oklahoma City v. Tuttle*, 471 U.S. 808, 816 (1985) (because respondent failed to raise the preservation issue in respondent's brief in opposition to the petition for certiorari, the defect was deemed waived). *See also* Sup. Ct. R. 15.1.

15. An exigent circumstances argument is also found in Petitioner's statement that if a warrantless seizure is not permissible under the circumstances of this case, "a person who police have probable cause to believe possesses crack cocaine *is free to walk away with the crack cocaine*" (Pet. at 14) (emphasis in original).

(2) The Minnesota Supreme Court ruled upon the disputed issues.

The issues of probable cause and seizure incident to arrest were ruled upon by the Minnesota Supreme Court in its decision in this case. *See Dickerson*, 481 N.W.2d at 486 (Pet. App. A-12). Because the Minnesota Supreme Court considered and ruled upon these issues, they were preserved for consideration by this Court on a writ of certiorari regardless of whether they were properly raised by Petitioner before the state courts. *See Mills v. Maryland*, 486 U.S. 367, 371 n.3 (1988).

(3) Petitioner properly preserved the disputed issues below.[16]

Petitioner preserved the probable cause issue at the trial court level. This was inherent in the prosecutor's argument that the seizure was justified under the "plain

16. The Minnesota appellate courts could have properly considered these subsidiary issues, even if Petitioner failed to preserve these issues, since these issues could be decided upon the evidence presented before the trial court. *See Harms v. Independent Sch. Dist. No. 300*, 450 N.W.2d 571, 577 (Minn. 1990) (a new issue may be raised on appeal if it does not depend on any new or controverted facts, is decisive of the controversy and failure to raise it below does not provide either party with an advantage or disadvantage).

feel" exception, a corollary to the plain view doctrine.[17] Probable cause is required for a seizure under the plain view doctrine. "To say otherwise would be to cut the 'plain view' doctrine loose from its theoretical and practical moorings." *Hicks*, 480 U.S. at 326. Consequently, seizures are only permissible under the "plain feel" exception when the sense of touch provides an officer with probable cause to believe that an object is contraband or other evidence of a crime.[18]

Petitioner also preserved the exigent circumstances issue as a justification for the warrantless seizure. In its brief below, Petitioner referred to this Court's holding in *Brown* that the warrantless probable cause seizure was permissible since the delay necessary to obtain a warrant may have endangered both the police and the public. *See* Brief for Respondent at 17, *State v. Dickerson*, 469 N.W.2d 462 (Minn. Ct. App. 1991), *aff'd*, 481 N.W.2d 840 (Minn. 1992) (hereinafter Petitioner's Appellate Court Brief).

In addition, Petitioner preserved the seizure incident to arrest issue. In its memorandum to the trial court, Petitioner stated "the officers had a right to seize the

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17. Although the exact words "probable cause" may not have been used in the trial court, Petitioner's trial court memorandums show that the prosecutor argued the concept of probable cause (J.A. 21-22, 24-26). The prosecutor also explicitly relied upon the holding in *State v. Alesso*, 328 N.W.2d 685, 689 (Minn. 1982), which was based, in part, upon the probable cause exception (J.A. 21-22, 25).

18. Petitioner noted below, both at oral argument before the Minnesota Court of Appeals and in its petition to the Minnesota Supreme Court, that the probable cause argument was preserved at the trial court level. *See* Petition for Review at 8-9 n.8, *State v. Dickerson*, 481 N.W.2d 840 (Minn. 1992).

substance and arrest" Respondent (J.A. 22). Petitioner also raised this issue before the state appellate courts when it relied upon the search incident to arrest holding in *State v. Bitterman*, 232 N.W.2d 91, 94-95 (Minn. 1975). *See* Petitioner's Appellate Court Brief at 17.

More importantly, Petitioner never disavowed a search incident to arrest theory as a justification for seizure of the crack cocaine. Petitioner only conceded that it never claimed that the *initial touching* of the pocket was justified as a search incident to arrest. *See* Petition for Review at 8-9 n.8, *State v. Dickerson*, 481 N.W.2d 840 (Minn. 1992).

Finally, regardless of whether the issues of probable cause, exigent circumstances and seizure incident to arrest were preserved before the Minnesota Supreme Court, these issues are "so connected with [the issues decided by the supreme court] in substance as to form" that they are simply "another ground or reason for alleging the invalidity" of the supreme court's ruling. *Dewey v. Des Moines*, 173 U.S. 193, 197-98 (1899). Therefore, these issues may be considered on the merits.

III.

THE POSSIBILITY THAT COLLATERAL LEGAL CONSEQUENCES WILL BE IMPOSED UPON RESPONDENT AS A RESULT OF THE TRIAL COURT'S FINDING OF GUILT SHOWS THAT THIS CASE PRESENTS A LIVE CONTROVERSY AND IS NOT MOOT.[19]

"[A] criminal case is moot only if it is shown that there is no possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction." *Sibron v. New York*, 392 U.S. 40, 57 (1968). This Court has repeatedly "adjudicate[d] the merits of criminal cases in which" the defendant has been discharged from either a probationary or prison sentence. *Id.* at 51. In several cases, this Court has held that a case is not moot if the underlying criminal proceedings may subject the defendant to enhanced sentences in future criminal proceedings. *See, e.g., Evitts v. Lucey*, 469 U.S. 387, 391 n.4 (1985); *Pennsylvania v. Mimms*, 434 U.S. 106, 108 n.3 (1977). Such cases are not moot even if the possibility of future criminal proceedings are remote. *See Benton v. Maryland*, 395 U.S. 784, 787-91 (1969).

Here, collateral consequences may still be imposed upon Respondent despite the dismissal of the complaint pursuant to Minn. Stat. § 152.18, subd. 1 (1989).[20]

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19. This issue is also addressed in the Reply Brief that Petitioner submitted to this Court in response to Respondent's Brief in Opposition to Petition for a Writ of Certiorari.

20. This statute is reprinted at Appendix A-2-3 of Petitioner's Brief on the Merits.

When a defendant is discharged pursuant to this statute, "a nonpublic record thereof shall be retained by the department of public safety solely for the purpose of use by the courts in determining the merits of subsequent proceedings against such persons." *Id.*

In holding that a discharge under Minn. Stat. § 152.18 does not render moot an appeal from the underlying finding of guilt, the Minnesota Supreme Court found that a discharged defendant faces a "sufficient 'possibility' of 'adverse collateral legal consequences.'" *State v. Goodrich*, 256 N.W.2d 506, 512 (Minn. 1977). This finding by the state supreme court should be determinative on whether Respondent is subject to collateral consequences following his discharge from probation pursuant to Minnesota law. *See Wainwright v. Goode*, 464 U.S. 78, 84 (1983) ("the views of the State's highest court with respect to state law are binding on the federal courts").

In addition, Respondent faces the possibility of adverse consequences in future federal court proceedings. Respondent's deferred adjudication will be included in his criminal history score if he is convicted of a federal offense. *See United States v. Frank*, 932 F.2d 700, 701 (8th Cir. 1991) (held that the inclusion of defendant's prior diversionary disposition under Minn. Stat. § 152.18 was proper). *See also* U.S.S.G. §§ 4A1.1(c) and 4A1.2(f).[21]

Unless the decision of the Minnesota Supreme Court is reversed, Respondent will not be subject to any of the adverse consequences imposed under Minn. Stat. § 152.18. "[T]he prospect of the State's inability to impose" these collateral consequences upon Respondent is "sufficient to

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21. These United States Sentencing Guidelines provisions and their supporting commentary are reprinted at Appendix B-1-4 in Petitioner's Brief on the Merits.

enable the State to obtain review of its claims on the merits here." *Mimms*, 434 U.S. at 108 n.3. Therefore, this case is not moot.[22]

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22. Assuming *arguendo* the instant case is technically moot, it is requested that this Court rule on the merits because the "plain feel" exception is of critical importance to future law enforcement activities and will undoubtedly recur. *See Southern Pac. Terminal Co. v. I.C.C.*, 219 U.S. 498, 515 (1911) (considered the merits of a moot case since the issue presented was "capable of repetition, yet evading review").

Alternatively, if the "capable of repetition" doctrine is not applicable, then Petitioner respectfully requests that this Court vacate the judgments of the Minnesota Supreme Court and the Minnesota Court of Appeals. *See DeFunis v. Odegaard*, 416 U.S. 312, 320 (1974) (state supreme court judgment in moot case was vacated and remanded "for such proceedings as by that court may be deemed appropriate"). Unless the judgments below are vacated, the State of Minnesota will be unfairly prejudiced in future cases by the precedential effect these judgments will undoubtedly have. *See generally In Re Ghandtchi*, 705 F.2d 1315, 1316 (11th Cir. 1983) (vacated judgment below when a federal criminal case was deemed moot on appeal). *Accord United States v. Sarmiento-Rozo*, 592 F.2d 1318, 1321 (5th Cir. 1979).

CONCLUSION

For the foregoing reasons and for the reasons set forth in Petitioner's Brief on the Merits, the State of Minnesota respectfully submits that the judgment of the Minnesota Supreme Court should be reversed.

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